Supreme Court, U.S.
FILED
MAY 3 2002

No. 03-873

IN THE

Supreme Court of the United States

HARRY D. HOSKINS, III, Individually and as Representative of A Class of Formosan Termite Victims; MRS. HARRY D. HOSKINS, III, Individually and as Representative of A Class of Formosan Termite Victims,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

EARL G. PERRY, JR.
Counsel of Record
P.O. Box 2387
New Orleans, LA 70176
(504) 586-9111

FRANK B. HAYNE III
234 Loyola Avenue
Suite 828
New Orleans, LA 70112-2078
(504) 588-2100

Attorneys for Petitioners

184692

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED AND FILED FEBRUARY 20, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 00-1713

SECTION "C" (5)

MR. AND MRS. HARRY D. HOSKINS, III
INDIVIDUALLY AND AS REPRESENTATIVES
OF THE CLASS OF FORMOSAN TERMITE VICTIMS

versus

UNITED STATES OF AMERICA and
STATE OF LOUISIANA

ORDER AND REASONS

Before the Court is the Motion of the United States to Dismiss, or in the alternative for Summary Judgment. (Rec. Doc. 19). Because Defendant has relied on material outside of the record in support of its motion, the Court shall treat the motion as one for summary judgment. After reviewing the record, the arguments of counsel and the applicable law, IT IS ORDERED THAT the Motion for Summary Judgment is HEREBY GRANTED.

Appendix

A district court can grant a motion for summary judgment only when the "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Cop, v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56 (c)). When considering a motion for summary judgment, the district court "will review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986). The court must find "[a] factual dispute . . . [to be] 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party . . . [and a] fact . . . [to be] 'material' if it might affect the outcome of the suit under the governing substantive law." *Beck v. Somerset Techs., Inc.*, 882 F.2d 993, 996 (5th Cir. 1989) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995) (citing *Celotex*, 477 U.S. at 322-24, and Fed. R. Civ. P. 56(e)). The mere argued existence of a factual dispute will not defeat an otherwise properly supported motion. *See Anderson*, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249-50 (citations omitted).

Appendix

Plaintiffs lawsuit alleges that the United States negligently allowed Formosan termites to enter this country, and was negligent in its failure to warn people about the risk of harm from the termites. Plaintiff also asserts liability against the federal government on the basis of breach of fiduciary duty, intentional tort, and strict liability. The United States maintains that Plaintiff's claims are time-barred, and that the claims of the other named Plaintiff, Mrs. Hoskins, and the as-of-yet unascertained class members must fail for lack of exhaustion. Furthermore, the United States insists that pursuant to the government's limited waiver of sovereign immunity under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), § 2671 *et seq.*, it may not be held liable in strict liability or for the commission of an intentional tort. Plaintiff maintains that the statute of limitations should be tolled because of his difficulty in ascertaining the involvement of the federal government in the tortious conduct described in the complaint, or, in the alternative, that the statute of limitations has not begun to run because his complaint alleges a "continuing tort violation."

The United States is immune from suit except to the extent that, and subject to the express conditions under which, it consents to waive such immunity. *See Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996). The Federal Tort Claims Act, 28 U.S.C. § 1346(b), § 2671, *et seq.*, is one such limited waiver of immunity, which must be strictly construed. *See United States v. Sherwood*, 312 U.S. 584, 590-91 (1941). Congress, in granting a waiver of sovereign immunity, may define the exact conditions of such waiver. *See Honda v. Clark*, 386 U.S. 484, 501 (1967). Under the Federal Tort Claims Act, a party has two years within which to file a claim

for a tort against the federal government. According to 28 U.S.C. § 2401(b), "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues. . . ." Hoskins discovered his termite problem in September 1994, but did not file a claim against the Department of Defense until April 1997. He claims that the statute should be tolled because he did not know that the federal government was involved in the termite problem. In support of his argument, Plaintiff cites *Gould v. U.S. Dep't of Health & Human Servs.*, 884 F.2d 785 (4th Cir. 1989), for the proposition that the limitations clock did begin to run until he became aware of the involvement of the federal government. This argument fails on two counts. First, *Gould* was overruled specifically with regard to the ruling upon which Hoskins relies in *Gould v. U.S. Dep't of Health & Human Servs.*, 905 F.2d 738 (4th Cir. 1990) (en banc), with the majority opinion written by the dissenting judge in the first *Gould* opinion.[1] Second, Defendant has provided articles from the New Orleans Times-Picayune as early as 1993, which reflect the fact that it was publicly known that Formosan termites came into the country on U.S. military boats after World War II and/or the Korea War. *See* Government Exh. E (including, for example, Iris Kelso, *Invasion of the Formosan Termites*, New Orleans Times-Picayune, May 6, 1993, at B7).

---

1. The first *Gould* opinion, holding that a lack of knowledge about a defendant's status as a federal employee tolled the statute of limitations, also appears to have been an aberration in light of the numerous other circuit court decisions to the contrary. *See, e.g., Zeleznik v. United States*, 770 F.2d 20 (3d Cir. 1985) (holding that parents' ignorance regarding the involvement of the INS in the release of the man who killed their son did not toll the running of the two-year statute of limitations) (citing *United States v. Kubrik*, 444 U.S. 111 (1979)).

Therefore, even if Plaintiff did not know about the government's involvement at the time the exterminator came to his house, a simple trip to the public library to learn more about Formosan termites would have revealed the link to the federal government. Plaintiff failed to satisfy his responsibility to undertake a reasonable investigation of his claims and not to sleep on his rights.

The only cases where there has been any leniency with regard to the FTCA statute of limitations have been in cases of wrongful death[2] — tolling the statute of limitations until the date of death, rather than the discovery of the harm that will lead to death — and the continuing medical treatment doctrine[3] — reflecting the policy in favor of encouraging individuals to continue receiving medical care, rather than breaking off treatment to commence a lawsuit. Otherwise, the Fifth Circuit and this Court specifically have acknowledged that the waiver of immunity provided for in the FTCA must be strictly construed. *See Wilkerson v. United States*, 67 F.3d 112, 118 (5th Cir. 1995); *Daniels v. Johnson Controls World Servs., Inc.*, 1994 WL 495862 (E.D. La. 1994). The only claim that upon first glance might seem to escape the statute of limitations difficulty is the negligent failure to warn, because that course of conduct continued beyond the discovery of the Government's involvement in allowing the critters to be brought into the country. However, the continuing tort theory is inapplicable to a cause of action

---

2. *See Johnston v. United States*, 85 F.3d 217 (5th Cir. 1996).

3. *See Page v. United States*, 729 F.2d 818, 822-23 & n.36 (D.C. Cir. 1984); *Kossick v. United States*, 330 F.2d 933, 936 (2d Cir. 1964); *but see Ashley v. United States*, 413 U.S. 490, 493 (9th Cir. 1969).

for negligent failure to warn. *See Castano v. American Tobacco Co.*, 870 F. Supp. 1425 (E.D. La. 1994) (Heebe, J.) (citing *GHR Energy Corp. v. Carboline Co.*, 744 F.Supp. 1405, 1407 (E.D. La. 1990) (Mentz, J.)). Therefore, because the statute of limitations has expired with regard to Plaintiff's claims of negligence against the government, those causes of action must be DISMISSED WITH PREJUDICE.

The Government also correctly argues that its limited waiver of immunity does not extend to claims of intentional toil or sustain strict liability. The FTCA only confers jurisdiction on federal courts to hear matters pertaining to "the negligent or wrongful act or omission of any employee of the government. . . ." 28 U.S.C. § 1346(b). The Supreme Court and the Fifth Circuit have ruled that there can be no claim of strict liability against the federal government. *See Laird v. Nelms*, 406 U.S. 797, 803 (1972) ("[T]he [FTCA] did not authorize the imposition of strict liability of any sort upon the government.") (citing *Daleheite v. United States*, 346 U.S. 15 (1953)); *Lathers v. Penguin Indus., Inc.*, 687 F.2d 69, 72 (5th Cir. 1982) ("the language of the FTCA has been interpreted as precluding liability of the United States based on strict liability") (internal citations omitted). This would also preclude any claim of strict liability against the federal government based on the allegation that its actions that led to the introduction of the Formosan termites into the county were unreasonably dangerous per se.

Plaintiff also alleges that the Government committed an intentional tort of deceit by knowingly importing "things" infected with Formosan termites into the United States, and by deliberately and intentionally spreading the termites to

vulnerable areas of the United States. *See* Plaintiff's Amended Complaint at ¶ 17, Third Supplement and Amendment to Complaint at ¶ 24. However, the FTCA specifically states that "[t]he provisions of this chapter and § 1346 (b) of this title shall not apply to . . . (h) . . . any claims arising out of . . . deceit. . . ." 28 U.S.C. § 2680(h). *See also Gaudet v. United States*, 517 F.2d 1034, 1035 (5th Cir. 1975) (noting that it is the substance, rather than the language, of the complaint that determines whether it alleges negligence or an intentional tort). Therefore, Plaintiff's claims sounding in strict liability and intentional tort are precluded by the FTCA and are hereby DISMISSED WITH PREJUDICE.[4]

The Government seeks to dismiss any claims brought by Mrs. Hoskins or the potential members of a class asserting claims against the Government for failure to exhaust administrative remedies. Exhaustion of administrative remedies is an absolute prerequisite to the maintenance of an action under the FTCA. *See* 28 U.S.C. § 2675;[5] *Molinar*

4. Certain claims for deceit or misrepresentation have been found to "arise out of" negligence, and therefore are not prohibited under the FTCA. *See, e.g., Beech v. United States*, 345 F.2d 872, 874 (5th Cir. 1965) The Court's sense is that Plaintiff's intentional tort allegation is more aptly characterized as a claim of this nature. However, as the Court has already explained above, Plaintiff's claims based on negligence fail because the statute of limitations has already run.

5. 28 U.S.C. § 2675(a) states:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss

(Cont'd)

v. United States, 515 F.2d 246, 249 (5th Cir. 1975). Only Mr. Hoskins has filed any type of administrative claim with regard to property damages, and his claims were filed beyond the outer limit of the statute of limitations period, as discussed *supra*. The record demonstrates that Mrs. Hoskins has not pursued any administrative remedies. As she found out about her termite problem in 1994 as well, the window within which she could do so has passed. Because there are currently no other named members of the purported class, there are no other parties who have claims ripe for adjudication by this Court. A class action may be brought under the FTCA only if each claimant has individually satisfied the jurisdictional prerequisites for maintaining a suit under the FTCA. *See Founding Church of Scientology of Washington, D.C., Inc. v. Director, Fed. Bureau of Investigation*, 459 F. Supp. 748, 755 (D.D.C. 1978) (citing *inter alia Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977); *Caidin v. United States*,

---

(Cont'd)

> of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

564 F.2d 284 (9th Cir. 1977); *Commonwealth of Pa. v. National Ass'n of Flood Ins.*, 520 F.2d 11 (3d Cir. 1975)). Therefore, because Mr. and Mrs. Hoskins are the lead plaintiffs in this case, and since both of their claims fail, this case should not be sustained based on what might happen with as-yet-to-be-determined plaintiffs.[6]

With regard to Plaintiff's claim of breach of fiduciary duty, Plaintiff has provided no support for the argument that the federal government has a "fiduciary duty" to its citizens, let alone any cases where the Government was found to have breached such a duty. Plaintiff alleges that "[a]s the government of these people, the US owed them a fiduciary

---

6. Plaintiff has argued that the exhaustion requirement of the FTCA may not apply because some class members may have suffered harm prior to the enactment of the 1966 Amendment to the FTCA. Mr. and Mrs. Hoskins discovered their harm in 1994 and failed to exhaust their remedies within the appropriate amount of time. There is no indication that there are potential plaintiffs who may have learned of Formosan termite damage prior to 1966. Even if there were, their claims would still be subject to the two-year statute of limitations of the FTCA, which existed prior to the 1966 Amendments, and their claims would now be stale. Therefore, potential plaintiffs with claims accruing prior to 1966 are now time-barred from proceeding, and potential plaintiffs with claims accruing after 1966 are required to exhaust their remedies. However, under neither scenario can Mr. Hoskins attempt to create a class including his wife and him. His claim clearly accrued after 1996, which now fails due to the statute of limitations. Her claim accrued on the same date, and fails for lack of exhaustion. Again, the Court reiterates that every member of the class attempting to bring a claim under the FTCA must have individually satisfied the jurisdictional prerequisites for maintaining a suit. *See Founding Church of Scientology of Washington, D.C., Inc.*, 459 F. Supp. at 754-55.

duty. As a fiduciary to these people, the US owed them a continuing duty of full disclosure of this insidious risk, which duty reoccurred every day until plaintiffs learned of this risk from other sources." *See* Plaintiff's Complaint at ¶ 10. However, upon reading Plaintiff's "breach of fiduciary duty" count, it seems clear that this allegation is simply a restatement of negligent failure of duty to warn. Therefore, for the reasons expressed *supra*, this count is also DISMISSED WITH PREJUDICE.

Although the State of Louisiana has not yet answered the Complaint,[7] the Court questions whether it may retain jurisdiction over the remainder of this dispute, which seeks money damages from the State of Louisiana, in light of the Eleventh Amendment to the United States Constitution prohibiting such suits in federal court. Plaintiff shall brief this issue for the Court by March 12, 2001, at 5:00 p.m.

Considering the fact that this Court may not have jurisdiction over this case for much longer, and the fact that the only party who objected to Plaintiff's request for additional time to certify a class in this case is no longer in this lawsuit, there is no reason to accelerate any determination with regard class certification. Therefore, Plaintiff's Motion asking for additional time to address issues of class certification (Rec. Doc. 22) is hereby GRANTED.

---

7. A preliminary default judgment was entered against the State of Louisiana on January 31, 2001 (Rec. Doc. 25).

Appendix

New Orleans, Louisiana, this 20 day of February, 2001.

s/ Helen G. Berrigan
HELEN G. BERRIGAN,
UNITED STATES DISTRICT JUDGE